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No. 82-541

In the Supreme Court of the United States

OCTOBER TERM, 1982

RALPH AH SAM, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT (FORMERLY THE UNITED STATES COURT OF CLAIMS)

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Navy's practice of taking into account the cost of living allowance ("COLA") paid to a supervisory general schedule employee under 5 U.S.C. 5941(a) for purposes of comparing his salary to that paid to prevailing rate employees under his supervision validly implements the "highest paid subordinate" rule of 5 U.S.C. 5333(b).

2. Whether, prior to June 26, 1974, the Navy's application of the "highest previous rate" rule of 5 C.F.R. 531.203(c) to general schedule appointees entitled to COLAs was based on an unreasonable interpretation of that regulation and the underlying statute.

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OPINIONS BELOW

The opinion of the Court of Claims (Pet. App. 1a-28a) is reported at 599 F.2d 411.

JURISDICTION

The judgment of the Court of Claims was entered on May 19, 1982. On August 10, 1982, the Chief Justice extended the time for filing a petition for a writ of certiorari to September 16, 1982, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

STATUTES AND REGULATIONS INVOLVED

5 U.S.C. 5333 provides in pertinent part:

Minimum rate for new appointments; higher rates for supervisors of wage-board employees.

(a) New appointments shall be made at the rate of the appropriate grade.

* * * * *

(b) Under regulations prescribed by the Civil Service Commission, an employee in a position to which this subchapter applies, who regularly has responsibility for supervision (including supervision over the technical aspects of the work concerned) over employees whose pay is fixed and adjusted from time to time by wage boards or similar administrative authority as nearly as is consistent with the public interest in accordance with prevailing rates, may be paid at one of the rates for his grade which is above the highest rate of basic pay being paid to any such prevailing-rate employee regularly supervised, or at the maximum rate for his grade, as provided by the regulations.

5 U.S.C. 5334 provides in pertinent part:

Rate on change of position or type of appointment; regulations.

(a) The rate of basic pay to which an employee is entitled is governed by regulations prescribed by the Civil Service Commission in conformity with this subchapter and chapter 51 of this title when—

(1) he is transferred from a position in the legislative, judicial, or executive branch to which this subchapter does not apply.

* * * * *

(6) his employment status is otherwise changed; or

(7) his position is changed from one grade to another grade.

5 C.F.R. 531.203(c) (1974) provides in pertinent part:

Position or appointment changes. Subject to §§ 531.204, 531.515, 539.201 of this chapter, and section 5334(a) of title 5, United States Code, when an employee is reemployed, transferred, reassigned, promoted, or demoted, the agency may pay him at any rate of his grade which does not exceed his highest previous rate; however, if his highest previous rate falls between two rates of his grade, the agency may pay him at the higher rate. * * *

5 C.F.R. 531.305 (1974) provides in pertinent part:

Adjustment of rates.

(a) *Rate payable to supervisor.* (1) Except as provided in subparagraph (2) of this paragraph, when an agency decides to adjust the rate of pay for a supervisor under section 5333(b) of title 5, United States Code, and this subpart, it shall adjust his rate of pay to the nearest rate (but not above the maximum rate) of his grade which exceeds the highest rate of basic pay (excluding night differential) paid to any wage board employee for whom the supervisor regularly has responsibility for supervision.

(2) When a supervisor is in an area in which he receives a cost-of-living allowance or post differential based on hardship, and the wage board employee he supervises does not receive a separately stated cost-of-living allowance or post differential, the agency shall add to the supervisor's

rate of basic pay his cost-of-living allowance or post differential and use the total to adjust his rate of pay under subparagraph (1) of this paragraph.

* * * * *

STATEMENT

1. The two principal pay systems for federal employees are the General Schedule (GS) (5 U.S.C. (& Supp. V) 5331 *et seq.*) and the prevailing-rate Wage System (WS) (5 U.S.C. (& Supp. V) 5341 *et seq.*), which comprise most federal "white collar" and "blue collar" positions respectively. See generally *United States* v. *Clark*, 454 U.S. 555, 556-557 (1982). The GS is divided into 18 numbered grades, which are each subdivided into rates of pay, or "steps." 5 U.S.C. 5104, 5332. The salary for each step and grade of the GS is uniform nationwide. However, certain GS employees, including those stationed in areas outside the contiguous 48 states with "living costs substantially higher than in the District of Columbia," are entitled to a cost of living adjustment ("COLA") of up to 25% of their rate of basic pay pursuant to regulations prescribed by the President. 5 U.S.C. 5941(a)(1).[1] The WS is also divided into grades and subdivided into steps, but the rate of pay for each WS step is not uniform nationwide. Rather, it is based upon wage surveys of prevailing rates for comparable work in local wage areas. 5 U.S.C. (Supp. V) 5343. Because differing costs of living are already taken into account in setting basic

[1] Regulations promulgated by the Office of Personnel Management define the "rate of basic pay" as "the rate of pay fixed by law or administrative action for the position held by any employee before any deductions and exclusive of additional pay of any kind." 5 C.F.R. 531.201(i).

WS pay rates, there is no provision for separate COLAs in the WS.

As a general rule, when a WS employee changes to a GS position, his salary is determined under the "highest previous rate" rule of 5 C.F.R. 531.203(c) (1974), which provides that "when an employee is reemployed, transferred, reassigned, promoted or demoted, the agency may pay the employee at any rate of the grade which does not exceed his or her highest previous rate: however, if the employee's highest previous rate falls between two rates of his or her grade, the agency may pay him or her at the higher rate." [2] In some areas, prevailing rates are sufficiently high that a GS supervisory appointee, even after application of the "highest previous rate" rule, might be placed at a salary level lower than his WS subordinates. In 1962, to alleviate management problems caused by such a "pay inversion" (Pet. App. 2a), Congress enacted 5 U.S.C. 5333(b). That statute provides that, pursuant to regulations to be promulgated, a GS employee who regularly supervises WS employees "may be paid at one of the rates for his grade which is above the highest rate of basic pay being paid to any such prevailing-rate employee regularly supervised, or at the maximum rate of his grade." This "highest paid subordinate" rule operates independently of the "highest previous rate" rule and may in some cases result in an additional upward adjustment of the starting GS salary.

2. Petitioners are five past and present civilian employees of the Pearl Harbor Naval Shipyard in

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[2] The Court of Claims referred to the 1974 version of the highest previous rate rule (see Pet. App. 3a n.1), and therefore we will also refer to that version. The present version does not differ from that version in any aspect material to this case.

Hawaii who were transferred or promoted from WS positions to GS supervisory positions before June 26, 1974 (Pet. App. 5a-6a). Because the cost of living in Hawaii is substantially higher than it is in the District of Columbia, GS employees in that state generally are paid COLAs pursuant to 5 U.S.C. 5941(a)(1) and Exec. Order No. 10000 (as amended) (reprinted at 5 U.S.C. 5941 note). See 5 C.F.R. 591.203 (1974); 5 C.F.R. 591.207 and App. A; Pet. App. 6a. The present dispute stems from petitioners' disagreement with the manner in which the Navy took these COLAs into account in computing their starting GS salaries under the "highest previous rate" rule and the "highest paid subordinate" rule.

a. With respect to the highest paid subordinate rule, the Navy has at all relevant times followed the practices specified in 5 C.F.R. 531.303, 531.304, and 531.305 (1974) (see Pet. App. 4a-5a n.2). Section 531.303 provides that in deciding whether to increase a supervisor's salary under the discretionary authority of 5 U.S.C. 5333(b), an agency shall consider both (a) the relative rate-ranges of the supervisor and the prevailing rate employee supervised by him, and (b) the equities among supervisors in the same organizational entity, as well as those between the supervisor and WS employee in question. Section 531.304(d) requires a determination that the supervisor's rate of basic pay is less than the rate of basic pay of some WS subordinate as a prerequisite to applying the highest paid subordinate rule, and Section 531.305 deals with calculating the GS pay rate for those purposes. In particular, Section 531.305(a)(2) specifies how COLAs are to be treated:

> (2) When a supervisor is in an area in which he receives a cost-of-living allowance or post differential based on hardship, and the wage board employee he supervises does not receive a separately stated cost-of-living allowance or post differential, the agency shall add to the supervisor's rate of basic pay his cost-of-living allowance or post differential and use the total to adjust his rate of pay under [the highest paid subordinate rule].

In accordance with these regulations, the Navy added to petitioners' rates of basic pay the COLA applicable for Hawaii (Pet. App. 13a-15a). If the COLA and rate of basic pay taken together yielded a total amount that was greater than the salary of the highest paid subordinate, no further adjustment was made. If the total was less than the salary of a WS subordinate, the Navy adjusted the supervisor's salary to a level at which his total salary, including the COLA, exceeded that of the WS subordinate (*id.* at 15a).

b. Until 1974, the Navy treated COLAs similarly in determining the initial rates of supervisors' pay for purposes of the highest previous rate rule of 5 C.F.R. 531.203(c) (1974). In applying that rule in connection with a transfer from the WS to the GS, the employee's highest previous rate of pay under the WS was compared to his new GS salary, including the Hawaii COLA (Pet. App. 7a). If the employee's highest previous rate of pay exceeded the new GS salary including the COLA, the Navy would raise the rate of GS basic pay to a step at which that pay plus the COLA would exceed the employee's highest previous pay rate (Pet. App. 8a). After June 26, 1974, the Navy altered its interpretation of Section 531.203(c) and began comparing the previ-

ous WS rate of basic pay to the new GS rate without regard to the COLA (*ibid.*). Under the new interpretation, the Navy first adjusted the employee's GS rate upward to equal or exceed the highest previous rate paid to him under the WS and then added the COLA to establish his total compensation.

3. Petitioners, who were originally joined by several other similarly situated employees, filed a group grievance in 1975 with the Shipyard Commander for submission to the Civil Service Commission. They protested the Navy's refusal to readjust their salaries by applying the 1974 reinterpretation of the highest previous rate rule retroactively to promotions that occurred when the previous interpretation was in effect. Petitioners also challenged the Navy's consideration of their COLAs when applying the highest paid subordinate rule. They contended (see Pet. App. 15a-16a) that 5 U.S.C. 5333(b) requires the Navy to compare the basic pay rate (excluding COLAs) of the GS supervisory position to that of the highest-paid WS subordinate; if the GS rate is lower than that of the subordinate, the GS rate should be increased by the COLA (see 5 C.F.R. 531.305(a)(2)(1974)) and the total keyed to the next highest GS step level. Under petitioners' suggested computation, that figure would represent the supervisor's basic pay, and he would be entitled to the applicable COLA in addition. The Navy's methodology was upheld at the administrative level.

Eight supervisors then filed suit in the United States District Court for the District of Hawaii (Pet. App. 6a). Thereafter, the suit was transferred to the Court of Claims, with respect to five of the eight original plaintiffs, pursuant to 28 U.S.C. 1406(c) (Pet. App. 6a). In addition to challenging

the Navy's interpretation of the controlling statutes and regulations, petitioners contended in the Court of Claims that the Navy's differential treatment of GS supervisors who do and who do not receive COLAs, and of GS supervisors promoted from WS positions before and after June 26, 1974, both were violations of equal protection. On May 19, 1982, a divided panel of the Court of Claims entered judgment for the United States.

The Court of Claims rejected petitioners' statutory challenge to the Navy's pre-June 1974 interpretation of the highest previous rate rule. Observing that both the statute and the regulation (5 C.F.R. 531.203(c) (1974)) are silent as to the treatment of COLAs, the court held that the Navy's original interpretation was one of several reasonable and acceptable ways of applying the rule (Pet. App. 9a-13a). The court further explained that 5 U.S.C. 5333(b), which establishes the highest paid subordinate rule, is similarly silent with respect to COLAs, and it concluded that the Navy's decision to include COLAs in the GS to WS comparison for purposes of this rule was also reasonable (Pet. App. 13a-17a). The court noted in this regard that the Navy's treatment of COLAs under the highest paid subordinate rule was in conformity with the regulatory guidelines of the Civil Service Commission, the agency principally responsible for implementing the statute (*id.* at 17a). Finally, the court rejected both of petitioners' equal protection arguments. With respect to the different treatment of the employees covered by the Navy's pre-1974 interpretation of the highest previous rate rule, the court explained that changes in the law generally are prospective and stated that

it would "effectively inhibit any legislative or other governmental body from amending its statutes or regulations" (*id.* at 19a) if prospective changes in entitlement laws were deemed to violate equal protection guarantees (*id.* at 12a, 18a-19a). The court also found rational, and thus upheld as constitutionally permissible, the decision to include supervisors' COLAs in their rate of pay for purposes of applying the highest paid subordinate rule (*id.* at 19a-20a). The court explained (*id.* at 20a):

> Cost-of-living allowances are designed to offset the expense incurred by GS employees living and working in high cost areas. WS pay rates, by their nature, reflect the cost of living. The Navy's inclusion of COLA in the calculation was reasonably designed to compare equivalents.

Judge Kashiwa dissented (*id.* at 21a-28a).[3]

ARGUMENT

Petitioners contend (Pet. 5-9) that they are entitled to a pay adjustment because the Navy erroneously considered their COLAs, in two different respects, for purposes of setting their GS pay rates. These contentions were correctly rejected by the Court of Claims. Moreover, the decision below is of limited prospective importance, and it does not conflict with any decision of this Court or a court of appeals. Accordingly, review by this Court is unwarranted.

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[3] Petitioners had also argued that the Navy erred in applying the highest previous rate rule rather than giving them an automatic "two-step increase" in computing their starting GS salaries. The Court of Claims summarily rejected this contention on the authority of this Court's intervening decision in *United States* v. *Clark*, *supra* (Pet. App. 6a-7a).

1.a. Petitioners contend (see Pet. 6-7; Pet. App. 7a, 13a) that the Navy was strictly bound by 5 U.S.C. 5333(b) to compare the basic rates of pay of GS supervisors and their highest paid WS subordinates for purposes of the highest paid subordinate rule without regard to COLAs. This contention is without merit.

Section 5333(b) provides that a GS supervisor "may be paid at one of the rates for his grade which is above the highest rate of basic pay being paid to any such prevailing-rate employee regularly supervised * * *." Petitioners insist (Pet. 6-7) that this language requires that all comparisons and adjustments must be made strictly on the basis of the respective rates of basic pay (excluding COLAs) for the WS and GS positions being compared. But Section 5333(b) contains no such command. As the Court of Claims recognized (Pet. App. 9a), the statute is completely silent with regard to COLAs. It specifies only that an agency may adjust the salary of a GS supervisor to some rate of pay that exceeds the "basic rate of pay" of the WS subordinate. In the words of the Court of Claims (*id.* at 11a), nothing in the statute "dictates that COLA cannot be used to compute or establish the rate of basic pay to which a GS employee would be entitled" to accomplish that end.

The Navy's decision to consider the COLA in setting the appropriate rate of pay for GS employees is entirely reasonable given the nature of the WS and GS systems. The payment of a COLA is unusual in the GS and applies to relatively few employees, and it is understandable that the treatment of COLAs was not specifically addressed by Congress in Section 5333(b). COLAs are paid to petitioners

and other GS employees in Hawaii because the cost of living in that state is inordinately high. See 5 U.S.C. 5941(a)(1); Exec. Order No. 10000, *supra*; 5 C.F.R. 591.203 (1974); 5 C.F.R. 591.207.[4] But WS pay rates, unlike GS pay rates, are based directly on the prevailing rates of local wage areas and thus, in high cost areas like Hawaii, already have a built-in COLA. Therefore, when the Navy includes COLAs in comparing GS salary levels in Hawaii to the rates paid to subordinate WS employees, it "is comparing equivalents" (Pet. App. 11a; see also *id.* at 20a). Moreover, the Navy's treatment of COLAs in its highest paid subordinate adjustments is prescribed by 5 C.F.R. 531.305(a)(2) (1974). Section 5333(b) requires that rates be adjusted according to regulations prescribed by the Civil Service Commission (now OPM), and the "courts should defer to an agency's construction of its own statutory mandate" unless it is unreasonable or obviously incorrect. *Board of Governors* v. *First Lincolnwood Corp.*, 439 U.S. 234, 251 (1978). See generally *United States* v. *Clark*, *supra*.

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[4] Judge Kashiwa observed in dissent that COLAs may be paid under 5 U.S.C. 5941(a) either because the relevant location has a substantially higher cost of living than the District of Columbia, or because environmental conditions in the area are adverse and warrant the payment of a recruiting incentive. Judge Kashiwa rejected the Navy's approach largely because of his belief that it was unknown to what extent the COLA paid to GS employees in Hawaii was based on the cost of living factor (Pet. App. 24a-25a). The controlling regulation (5 C.F.R. 591.203 (1974)) makes clear, however, that the COLA for Hawaii was indeed based on the high cost of living in that state, rather than intended as a recruitment incentive. Compare also 5 C.F.R. 591.207 with 5 C.F.R. 591.209.

The Navy's treatment of COLAs under the highest paid subordinate rule is also fully consonant with the congressional purpose underlying the establishment of that rule. Congress was concerned about "[i]nequities [that] exist[ed] among the various Federal pay systems" because "supervisors under the [GS] system are sometimes paid less than their subordinates who are under a wage board system." S. Rep. No. 2120, 87th Cong., 2d Sess. 5 (1962). This problem was attributed to a "lack of coordination between the systems." *Ibid.* The enactment of Section 5333(b) was intended to "ameliorate" the problem of pay inversion by affording agencies limited discretion to raise a GS supervisor's salary above that of his prevailing rate subordinates. See House Comm. on Post Office and Civil Service, 87th Cong., 2d Sess., *Statement of Purpose and Justification and Section-by-Section Analysis of the Legislature Requested by the President of the United States to Reform the Major Federal Statutory Salary Systems* 9-10, 20 (Comm. Print 1962). In short, the purpose of the statute is simply to provide a means of coordination between the two pay scales in order to afford a GS supervisor greater remuneration than his WS subordinates. The approach taken by the Navy and OPM regulations plainly accomplishes this purpose.[5] By contrast, petitioners' suggested method of computation would provide a windfall benefit to GS supervisors, one that has no connection with the stat-

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[5] Petitioners carefully state (Pet. 4) that the Navy's practice afforded them "a lower initial rate of pay and a lower rate *vis-a-vis* their WS subordinates than if COLA had not been added for pay comparison." Petitioners do not and cannot claim that the Navy's approach caused them to receive lower total remuneration than their WS subordinates.

utory purpose, by awarding them the amount of the COLA twice (see Pet. App. 15a-16a).[6]

b. Petitioners also contend (Pet. 6-7) that the Navy's pre-1974 practice of including COLAs in the GS salary when applying the highest previous rate rule violates the statute. This contention is similarly without merit. As with the highest paid subordinate rule, the highest previous rate rule of 5 C.F.R. 531.203(c) (1974) is silent with regard to COLAs. The Navy altered its interpretation of that rule on June 26, 1974, to provide that COLAs would be added only after applying the rule to establish the

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[6] Petitioners' contention that the Navy's computation unconstitutionally discriminates against GS supervisors who are entitled to COLAs is insubstantial. First, the Navy should not even be regarded as treating the two classes of supervisors differently. In each case—whether or not the GS supervisor in question is receiving a COLA—his "total remuneration" (Pet. App. 13a) is compared to the salary received by the highest paid subordinate. Even if the Navy's inclusion of COLAs in the calculation is somehow regarded as discrimination against supervisors in Hawaii on the theory that it denies them a salary adjustment based on their basic rate of GS pay standing alone, no constitutional problem would be posed. The Constitution permits different classes of persons to be treated differently under an entitlement statute so long as there is a rational basis for the distinction. See, *e.g.*, *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307, 314-317 (1974); *McGowan* v. *Maryland*, 366 U.S. 420, 425-427 (1961). Here, there can be no doubt that there is a rational basis for considering for comparison purposes only the basic rate of pay of GS supervisors not entitled to COLAs, while adding to the rate the COLAs of those supervisors who do not receive them, since the Navy's approach results in "comparing equivalents" (Pet. App. 11a) and is calculated in both cases to afford the GS supervisor an adjusted rate of total remuneration above that of his WS subordinates.

GS entry level on the basis of the previous WS rate. But as the Court of Claims explained (Pet. App. 10a-11a), the Navy's adoption of a more liberal approach at that time did not render its earlier interpretation unreasonable. The court correctly invoked the principle that a reasonable administrative interpretation of a statute should be upheld, "even though the agency conclusion is not the only reasonable one or even the one the court would have reached if the question had arisen in the first instance in judicial proceedings" (Pet. App. 10a, citing *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965)).

Indeed, the highest previous rate rule requires only that a transferred or promoted employee ordinarily be paid "at any rate of grade which *does not exceed* his highest previous rate" of WS pay. 5 C.F.R. 531.203(c) (1974) (emphasis added). Whether or not a promoted or transferred employee is to be paid at the "higher rate" if his converted WS salary falls between two rates of the appropriate GS grade is left by Section 531.203(c) entirely to the discretion of the employing agency. The Navy was free, under any reading of Section 531.203(c), to pay petitioners a GS salary equal to or lower than that they had previously received as prevailing-rate employees. The Navy's approach of paying transferees from the WS to the GS "higher" salaries only after COLAs were taken into consideration thus was squarely within the range of its discretion under the highest previous rate rule.[7]

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[7] Petitioners' contention (Pet. 5-7) that the decision below is inconsistent with this Court's decision in *United States* v. *Clark*, *supra*, is frivolous. The only issue in this case controlled by *Clark* is whether petitioners were entitled on their promotions from the WS to the GS to have their rates of

2. Apart from the correctness of the decision below, further review is unwarranted here because of the limited impact of the decision. Petitioners' complaints about the Navy's treatment of COLAs under the highest previous rate rule apply only to transfers

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pay determined initially under the "two-step increase" rule of 5 U.S.C. 5334(b). The Court of Claims stayed its decision in this case until this Court decided *Clark*, and then it resolved the question against petitioners in direct compliance with this Court's disposition of *Clark* (Pet. App. 7a). Petitioners do not explain how *Clark* provides a basis for resolving in their favor the other issues presented here concerning the consideration of COLAs. To the contrary, no aspect of the decision below is even arguably inconsistent with the letter or the spirit of *Clark*.

By the same token, none of the authorities on which petitioners rely (Pet. 8 n.5) supports the claim that COLAs may not be added to the rate of basic pay for pay adjustment determinations. *Shadduck* v. *United States*, 142 Ct. Cl. 516 (1958), held that a federal employee in transit from Hawaii to a reappointment on the mainland was not entitled to a COLA while on annual leave status outside Hawaii. *Kalv* v. *United States*, 128 Ct. Cl. 207 (1954), held that a serviceman entitled to back pay for a wrongful removal from an overseas position for which a post differential was paid was not entitled to have the differential included in the award. *Curlott* v. *Campbell*, 598 F.2d 1175, 1177 (9th Cir. 1979), involved only whether due process required the Civil Service Commission to afford plaintiffs a hearing before deciding to reduce COLAs in Alaska for a certain class of employees. Finally, Federal Personnel Manual 591(4-1)(d)(1) (1969) merely provides that COLAs or differentials paid to a GS employee may not be treated as part of the employee's base pay for purposes of "computing overtime pay, night differential, holiday pay, retirement deductions, *or any other additional pay, allowance, of pay differential*" (emphasis added). To the extent that that guideline has any import in this case, it *supports* the Navy's decision not to consider COLAs for the quite different purposes of performing the two adjustments at issue here.

that occurred more than eight years ago. To the extent any similar grievances are outstanding, they are limited to a discrete class of civilian Navy employees transferred or promoted from WS to GS positions in the State of Hawaii prior to June 26, 1974—a class that necessarily will continue to become smaller over time. Even the practice of which petitioners complain that is still ongoing, namely, taking COLAs into account before applying the highest paid subordinate rule of 5 U.S.C. 5333(b), is of quite limited scope. It has no application whatsoever in the contiguous 48 states, where no COLAs are paid. See 5 U.S.C. 5941(a); Pet. App. 22a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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